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April 4, 2019

VIA ELECTRONIC FILING

Ms. Jocelyn Boyd
Chief Clerk and Administrator
South Carolina Public Service Commission
Synergy Business Park, The Saluda Building
101 Executive Center Drive
Columbia, SC 29210

RE: Application of Duke Energy Progress, LLC for Adjustments in Electric
Rate Schedules and Tariffs and Request for Accounting Order
Docket No.: 2018-318-E.

Dear Ms. Boyd:

I am writing to respond to an issue raised in the letter of Andrew Bateman of the Office of Regulatory Staff ("ORS") on March 29, 2019. The ORS letter responded to a letter submitted on March 26, 2019 by counsel for Duke Energy Progress, LLC ("DEP") in which DEP informed the Commission that DEP was accepting the Basic Facilities Charges ("BFC") proposed by the ORS. In the ORS letter, Mr. Bateman raised a potential issue concerning the extent to which the Commission could allocate "the remaining revenue requirement to variable/volumetric rates" consistent with the due process provisions of S.C. Const., Art. I, §22. This letter is written to respond to that issue.

Article I, Section 22 of the South Carolina Constitution imposes due process requirements on actions of South Carolina administrative agencies: "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard..." The South Carolina Supreme Court has held that this provision guarantees persons the right to notice and an opportunity to be heard by administrative agencies. *Ross v. Medical University of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997).

The leading case on what notice is required to afford due process is *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) which approved of notice by publication in certain circumstances. The court in *Mullane* described the notice requirement of the due process clause as follows:



An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane, supra, p. 314. The South Carolina Supreme Court has held that substantial prejudice must be shown to establish a due process claim. *Tall Tower, Inc. v. South Carolina Procurement Panel*, 294 S.C. 225, 363 S.E.2d 683 (1987).

These authorities show that the notice provided of the DEP application in this proceeding easily meets the due process requirements of S.C. Const., Art. 1, §22. A copy of the notice which this Commission required DEP to provide is attached as Exhibit A. The notice informed DEP customers that DEP was asking for an overall 10.3% rate increase amounting to an additional \$59 million in annual revenues. The notice also provided an illustration showing that a residential customer, using 1,000 kWh would see an increase of approximately \$17.91 per month. The notice described in detail the proposed increase in the BFC from \$9.06 to \$29.00.

The effectiveness of the notice required by the Commission in this proceeding is best illustrated by the response it generated from the customers of DEP who received it. The Commission's Document Management System ("DMS") shows that 11 parties have intervened, including influential advocacy groups like the NAACP, Upstate Forever, the Sierra Club and the South Carolina Coastal Conservation League. The DMS also shows that no fewer than 330 people have submitted letters of protest responding to the notice. Further proof that DEP customers have had ample notice of the DEP proposal, and an opportunity to be heard on it, was shown by the very well attended night hearings held in Florence and Sumter this week attended by hundreds of customers, and where the Commission heard directly from such customers, primarily residential customers.

The large response to the notice in this proceeding shows that the notice meets the constitutional due process requirements cited in the ORS letter. It stands in stark contrast to the notice provision considered by the South Carolina Supreme Court in *Porter v. South Carolina Public Service Commission*, 338 S.C. 164, 525 S.E.2d 866 (2000).¹ In that case the court considered a notice given for "rate adjustments" that failed to disclose that the adjustments included increases in certain rates of as much as 104%. The court found the notice lacking:

Taken as a whole, this notice is not informative and in fact is somewhat misleading since one could conclude the "proposed rate adjustments" merely refers to the reduction in toll switched access rates.

¹ In the *Porter* case, the court considered whether the notice had complied with the provisions of S.C. Code Ann. §58-9-530, a provision that applies to telephone utilities but not electrical utilities.



Porter, supra, pp. 169-170. The notice of the DEP rate adjustment required by the Commission in this proceeding cannot possibly be criticized for failing to inform customers of the potential increase in rates being proposed by DEP and it is clear that DEP customers received notice “reasonably calculated” to provide them the opportunity to be heard as required by *Mullane* and related cases.

As this Commission is aware, the primary concern of many of the customers who responded to their opportunity to be heard, by writing letters of protest or showing up to speak at night hearings, was the DEP proposed increase in the BFC. The DEP letter of March 26th accepting BFC rates set out in ORS testimony was, in part, a response to the views of customers who exercised their right to be heard. The concern expressed by the ORS letter – that due process notice requirements somehow limit the Commission’s ability to respond to customer concerns by adjusting component elements of the DEP proposed charges – turns the relevant constitutional jurisprudence on its head and would lead to an absurd result. The *Tall Tower* case held that “substantial prejudice” must be shown to establish a due process claim. Contrary to the concern expressed by the ORS, substantial prejudice in this case would result from a ruling that the Commission could not respond to customer concerns and exercise their ratemaking jurisdiction about the BFC by adjusting other components of their charges.²

We hope this analysis resolves the questions raised in Mr. Bateman’s letter.

Yours truly,

Frank R. Ellerbe, III

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Enclosure

cc w/enc: Parties of Record (via email)
Heather Shirley Smith, Deputy General Counsel (via email)

² The Commission has a constitutional responsibility to set rates in this proceeding that provide DEP with an opportunity to earn a fair and reasonable rate of return on its property devoted to serving the public. *Southern Bell Tel. & Tel. Co., v. Public Service Commission*, 270 S.C. 590, 244 S.E.2d 278 (1978), citing *Bluefield Water Works v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
CLERK'S OFFICE**

REVISED NOTICE OF FILING AND HEARING AND PREFILE DEADLINES

DOCKET NO. 2018-318-E

DUKE ENERGY PROGRESS, LLC –Application of Duke Energy Progress, LLC for Adjustments in Electric Rate Schedules and Tariffs

On November 8, 2018, Duke Energy Progress, LLC (“Duke Energy Progress” or the “Company”) filed an Application with the Public Service Commission of South Carolina (“Commission”) requesting authority to adjust and increase its retail electric rates, charges, and tariffs. The Application was filed pursuant to S.C. Code Ann. §§58-27-820 and 58-27-870 and S.C. Code Ann. Regs. 103-303 and 103-823.

In its Application, Duke Energy Progress seeks rate changes to increase annual revenues by 10.3% or \$59 million, to be updated to account for known and measurable expenses for grid investments of approximately \$5.1 million in 2020 and \$5.8 million in 2021. The Company states that recent work to modernize the electric system, generate cleaner power, responsibly manage and close coal ash basins, and continually improve service to customers have made it necessary to request a net increase in retail revenues. The Company’s request includes \$10 million in net tax benefits resulting from the Federal Tax Cuts and Jobs Act. The Company states in its Application that its request is driven by capital investments and environmental compliance progress made by the Company since its previous rate case, including the further implementation of the Company’s generation modernization program, which consists of retiring, replacing and upgrading generation plants; investments in customer service technologies; and the Company’s continued investments in base work to maintain its transmission and distribution systems. The Company states that its request includes an increase in revenues of approximately \$38 million for capital additions incurred since its last rate case through December 31, 2018.

The Company also requests approval of its proposed Grid Improvement Plan, approval of a Prepaid Advantage Program, and a variety of accounting orders related to ongoing costs for environmental compliance, advanced metering infrastructure deployment, grid investments between rate changes, and regulatory asset treatment related to the retirement of a generating plant located in Asheville, North Carolina. Finally, the Company seeks approval to establish a reserve and accrual for end of life nuclear costs for materials and supplies and nuclear fuel.

Duke Energy Progress requests that the proposed increases be effective on June 1, 2019. According to the Company’s proposal in the Application, a typical residential customer using 1,000 kWh will see an increase of approximately \$17.91 per month beginning with the rate effective date in this case, requested to be June 1, 2019, and then an increase of \$1.60 per month beginning June 1, 2020 and an additional \$1.81 per month beginning June 1, 2021, to incorporate costs for grid investments per the Grid Improvement Plan described in the Application. Page 19 of the Application describes the Grid Improvement Plan, which can be described, in part, as a long-term initiative built upon strategic, data-driven investments to improve reliability to avoid outages and speed restoration; harden the grid to protect against cyber and physical threats; and to expand solar and other innovative technologies across a two-way, smart-thinking grid. The Company proposes additional rate changes in 2020 and 2021 to reflect the remaining years of the multi-year plan, with costs captured in a regulatory asset for recovery between rate changes. Duke Energy Progress proposes an increase in the Residential Basic Facilities Charge from \$9.06 to \$29.00 per month effective June 1, 2019.

A copy of the Company's Application, as well as the proposed rates, charges and tariffs may be obtained from the Commission at the following address: Public Service Commission of South Carolina, Clerk's Office, 101 Executive Center Drive, Suite 100, Columbia, South Carolina 29210. Additionally, the Application is available on the Commission's website at www.psc.sc.gov and is available from Heather Shirley Smith, Deputy General Counsel, Duke Energy Progress, LLC, 40 W. Broad Street, Suite 690, Greenville, South Carolina 29601; or Frank R. Ellerbe, III, Esquire, Robinson Gray Stepp & Laffitte, P.C., Post Office Box 11449, Columbia, South Carolina 29211.

Any person who wishes to participate in this matter as a party of record should file a Petition to Intervene in accordance with the Commission's Rules of Practice and Procedure on or before **February 1, 2019**, by filing the Petition to Intervene with the Commission, by providing a copy to the Office of Regulatory Staff and by providing a copy to all parties of record. For the receipt of future Commission correspondence, please include an email address in the Petition to Intervene. ***Please refer to Docket No. 2018-318-E and mail a copy to all other parties in this docket.*** Any person who seeks to intervene and who wishes to testify and present evidence at the hearing should notify, in writing, the Commission; the Office of Regulatory Staff at 1401 Main Street, Suite 900, Columbia, South Carolina 29201; and the company at the above address, on or before **February 1, 2019**. ***Please refer to Docket No. 2018-318-E.***

Any person who wishes to request that the Commission hold a public hearing in his or her county of residence in order to hear comments from the utility's customers should notify, in writing, the Commission at the address below; the Office of Regulatory Staff, at 1401 Main Street, Suite 900, Columbia, SC 29201; and the Company at the above address, on or before **February 8, 2019**.

PLEASE TAKE NOTICE that a hearing, pursuant to S.C. Code Ann. Regs. 103-817 and S.C. Code Ann. §58-27-870, on the above matter has been scheduled to begin on **Thursday, April 11, 2019, at 10:00 a.m.**, before the Commission in the Commission's Hearing Room at 101 Executive Center Drive, Suite 100, Saluda Building, Columbia, South Carolina 29210 for the purpose of receiving testimony and evidence from all interested parties. The hearing may continue through April 12, 2019, if necessary.

INSTRUCTIONS TO ALL PARTIES OF RECORD (Applicant, Petitioners, and Intervenors only): All Parties of Record must prefile testimony with the Commission and with all Parties of Record. Prefiled Testimony Deadlines: Other Parties of Record **Direct Testimony** Due: **3/4/2019**; Applicant's **Rebuttal Testimony** Due: **3/18/2019**; and Other Parties of Record **Surrebuttal Testimony** Due: **3/25/2019**. All prefiled testimony deadlines are subject to the information as posted on www.psc.sc.gov under **Docket No. 2018-318-E**.

For the most recent information regarding this docket, including changes in scheduled dates included in this Notice, please refer to www.psc.sc.gov and **Docket No. 2018-318-E**.

PLEASE TAKE NOTICE that any person who wishes to have his or her comments considered as part of the official record of this proceeding **MUST** present such comments in person to the Commission during the hearing.

Persons seeking information about the Commission's procedures should contact the Commission at (803) 896-5100 or visit its website at www.psc.sc.gov.

11/28/18